IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6361 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES

5. Whether it is to be circulated to the Civil Judge? : YES

UNITED CATALYSTS INDIA LTD

Versus

PRABHAT MOTIBHAI GOHIL

Appearance:

MR NK MAJMUDAR for Petitioner

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 17/04/2000

ORAL JUDGEMENT

Heard the learned advocates for the respective parties.

2. In the present petition, the order passed by the Payment of Wages Authority, Vadodara in Application No. 425 of 1990 dated 30.6.199 is challenged by the

petitioner-United Catalysts (India) Limited [hereinafter referred to as, `the Company'].

3. The brief facts of the case are that the respondent workman had preferred an application before the Payment of Wages Authority at Vadodara being Application No. 425 of 1990 for payment of subsistence allowance for 60 months and compensation thereon totalling Rs. 83,700/=. According to the respondent workman, he was suspended pending departmental inquiry on 24th August, 1985 and thereafter he requested the petitioner for payment of subsistence allowance during the pendency of the departmental inquiry, however, no payments were made to the petitioner, and thereafter, on 14th August, 1989, he gave written application to the petitioner under the provisions of the Model Standing Orders stating that he was entitled to get subsistence allowance during the pendency of the departmental proceedings at the rate of 75% [seventy five per cent] for 60 months which comes to Rs. 41,850/=. He also preferred his claim for compensation of the said amount which comes to total of Rs. 83,700/=. The petitioner-Company, in reply to the notice, resisted the claim made by the respondent workman and filed their reply at Exh. 5 and pointed out that application under Sec. 15 (2) of the Payment of Wages Act is not at all maintainable and that the subsistence allowance is not covered within the definition meaning of Section 2 (6) of the Payment of Wages Act, 1936. The petitioner Company also raised objections against the jurisdiction of the Authority and also raised contention with regard to delay in filing the said application. Thereafter, vide Exh. 8 purshis parties have submitted that there is no dispute with regard to the suspension of the workman concerned during the pendency of the departmental inquiry and their oral evidence was closed. The respondent workman had produced a copy of suspension order vide Exh. 9. Thereafter, the Authority has examined the merits of the matter and also the contentions raised by both the parties with regard to the limitation as well as payment of subsistence allowance. The Authority has also considered the decision of Karnataka High Court and came to the conclusion that respondent workman is entitled to subsistence allowance of Rs. 41,850/=. However, the claim of compensation raised by the respondent workman was rejected by the Authority.

Mr. N.K Majmudar, learned advocate appearing for the petitioner-Company has fairly admitted that there is no dispute about the suspension of the respondent workman during the pendency of the departmental inquiry . He

also fairly admitted that during the suspension period, the petitioner has not been paid any amount of subsistence allowance. However, Mr. Majmudar has raised a contention that the subsistence allowance is not covered within the definition of the Payment of Wages Act, 1936 and that there is a delay in filing the Wages Application under the provisions of Section 15 (2) of the Act, therefore, according to him, the Authority has committed error in admitting and entertaining the application which was filed belately before it by the workman concerned, and therefore, the Authority has committed gross error in considering it. In support of this contention, Mr. Majmudar has placed reliance upon a decision rendered by Guwhati High Court in the matter of S.K Majmudar v. Union of India & Ors., reported in (1983) Lab. IC p-1178. He also pointed out that definition of `Wages' given in Section 2 (6) does not include `subsistence allowance' and therefore, the Authority has no jurisdiction to pass any order granting subsistence allowance to the respondent workman. He also cited one decision of the Apex Court in the matter of Bombay Dyeing & Mfgr. Company Limited v. The State of Bombay & Ors., reported in 1958 SC p-328.

To appreciate the first contention raised by learned advocate for the petitioner, it is necessary to refer to the relevant provisions of the Payment of Wages Act. Section 2 (vi) of the Act reads thus-

2 (vi) `wages' means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes -

(a) xx xx xx x
(b) xx xx xx xx
(c) xx xx xx xx
(d) xx xx xx xx
(e) xx xx xx xx'

It is a well established law that the employer has a right to suspend an employee even in absence of any express provision. The employer is having an implied right which has been recognized by the Apex Court in the matter of The Management Hotel Imperial,New Delhi & Ors. versus Hotel Workers' Union, reported in AIR (1959) SC 1342. The Apex Court in the said decision has considered the power employer to suspend its employee on two

occasions viz., one is during the pendency of the departmental inquiry and (ii) during the pendency of the permission application under Sec. 33 of the Industrial Disputes Act, 1947. The Apex Court in the said verdict has held that, `the power of the employer to suspend an employee under the ordinary law of master and servant in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant, and such a power can only be the creature or of an express term in the contract itself. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so he will have to pay wages during the so-called period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relation of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. The ordinary law of master and servant as to suspension can be and should be held to have been modified in view of the fundamental change introduced by Sec. 33 in that law and a term should be implied by Industrial Tribunals in the contract of employment that if the master has held a proper enquiry and come to the conclusion that the servant should be dismissed and in consequence suspends him pending the permission required under Sec. 33, he has the power to order such suspension, thus suspending the contract of employment temporarily, so that there is no obligation on him to pay wages and no obligation on the servant to work. ' Considering this decision of the Apex Court, in the present case, it is not disputed that the provisions of Model Standing Orders, 1946 have been made applicable and under the said provision, the petitioner Company has power to suspend the respondent workman during the pendency of the departmental inquiry and under the provisions of the Standing Orders, it is the duty and liability of the employer to pay `subsistence allowance'. Whereas, in the present case, this aspect is also not disputed, therefore, considering the definition itself, if any amount of remuneration either by way of salary or allowance or otherwise expressed in terms of money or capable of being so expressed which would, if the terms of employment; express or implied, were fulfilled, be payable to a person employed in respect to his employment or of work done in such employment. Therefore, considering the provisions of the Standing Orders Act, the `subsistence allowance' is covered within the definition of the Wages

and the Authority has rightly answered the said question in affirmative. Therefore, the Authority has jurisdiction to entertain the said application.

The said question has also been examined by the Full Bench of Punjab & Haryana High Court, Andhra Pradesh High Court and other High Courts that subsistence allowance is payable during the suspension period and is covered by the definition of `wages' and is recoverable by resorting to provisions of Sec. 15 of the Payment of Wages Act, 1936. The following the decisions of various High Courts wherein the said question has been examined and decided to the effect that subsistence allowance is payable during the suspension is covered by the definition of `wages' and the same is recoverable by resorting to the provisions of Sec. 15 of the Payment of Wages Act, 1936.

1) Divisional Superintendent N.R
vs
Mukan Lal
[1957] 2 LLJ 452;

2) APSRTC v. Payment of Wages Authority
(1969) 35 FLR 417;

3) Asha Ram Birla v. G.M Raj. Cooperative
Dairy Federation Limited
(1983) Raj. L.R 687;
and
4) G.M., P.W.D., Workshop v.
D.Prabhakar Chetty
[1978]52 FLR 357 (AP)

The definition of `wages' given under Sec. 2 (vi), if properly read shows that the amount must be ascertained sum before it falls under the definition. In order to bring a particular payment under the definition of wages, two things are necessary, (i) a definite sum; and (ii) a contract indicating when the sum becomes payable. The last portion of the definition shows that payments stipulated to be made by reason of the termination of employment are also wages. That will be in the nature of damages. It is obvious that unless there is an express proviso for paying the stipulated sum, the definition will not cover such payment. In the present case, according to the provisions of Model Standing Orders which apply to the petitioner, there is an express proviso which entitle the workman a

subsistence allowance, if he is suspended during the pendency of inquiry. This fact has not been disputed by the petitioner, and therefore, considering this part, the subsistence allowance is covered within the definition of Wages given under Sec. 2 (vi) of the Payment of Wages Act, 1936. Where the contract of service provides; in the present case, the Standing Orders, which is considered to be statutory condition of service governing the relationship between the employer and the employee, that in the normal course of events, the employer will pay a certain wages and that during suspension, the employee will not be entitled to full wages but will be entitled to lesser amount as an allowance, which is considered to be a part of wages. There are three occasions of suspension known to law. A public servant may be suspended as a mode of punishment or he may be suspended during the pendency of an inquiry against him, if the order appointing him or statutory provisions governing his service provide for such suspension. Lastly, he may merely be forbidden from discharging his duties during the pendency of an inquiry against him which act is also called suspension. The right to suspension as a measure of punishment as well as the right to suspend the contract of service during the pendency of inquiry are both regulated in condition of service but the last category of suspension referred to earlier is the right of master to forbid his servant from doing any work which he had to do under the terms of the contract or the provisions governing his condition of service . In other words, the master may ask his servant to refrain from rendering his service but he must fulfill his part of contract, as held by the Apex Court in the case of V.P Gidroniya v. State of Madhya Pradesh, reported in AIR 1970 SC 149. The general power of master to dismiss his servant does not necessarily include a power to suspension. Suspension concern with an inquiry may be of two kinds and a distinction must be drawn between suspending an employee from service and suspending him from performing his duties or post or office. If there is a contract of service in the strict sense, the first occasion of suspension covers suspension of contract, while second covers only suspension of employee from performance of his duties on the basis that that the contract is subsisting. In the present case, the contract of service is not suspended because relationship between the employer and employee during the pendency of inquiry subsist, and therefore, when the contract of service is not suspended, the mutual rights and obligations of the employer and the employee; including the obligation of the employer to pay wages to the employee continues. In such a case, the contract of

employment is in operation and said contract of service is not terminated or suspended by the employer. Such a suspension merely amounts to prohibition by the employer preventing the employee from doing any work of the employer. The interim suspension of an employee, pending disciplinary action or criminal prosecution against him, authorised by rules, also falls into this class and therefore, the contract of service is not suspended but employer suspending an employee from performing his duties of the post or office during the pendency of departmental inquiry and in that circumstances, the employee's service is not terminated and he remain in service and the relationship between employer and employee subsist and continues.

In the matter of Balvantrai Ratilal Patel v. State of Maharashtra, 1968 (17) FLR 445, it is laid down inter alia that, `it is now well settled that the power to suspend in the sense of a right to forbid a servant to work is not an implied term in an ordinary contract between master and servant and that such power can only be the character either of a statute governing the contract or of an express term in the contract itself. Ordinarily, therefore, absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend the workman and even if he does so, in the sense that he forbids the employee to work, he will have to pay wages during the period of suspension. In the present case, there is a power with the petitioner to suspend the respondent workman on the basis of provisions under the Standing Orders Act, 1946 which statutory provisions governs the contract of service between the petitioner and the respondent workman. In the view taken by the Andhra Pradesh High Court of Judicature, reported in the matter of A.P Road Transport Corporation Limited v. The Payment of Wages Authority & Anr., 1970 (1) LLJ 700, it is held that, `the Payment of Wages Act, Section 2 (vi) wages claimed for payment of subsistence allowance pending domestic inquiry - Authority under the Payment of Wages Act having jurisdiction to entertain the claim wherein the same definition has been interpreted by the High Court that the relevant words, `which would if the terms of employment express or implied were fulfilled' includes the payment of subsistence allowance, when the employee is suspended during the inquiry into the charges levelled against him. A close reading of this definition would indicate that it is not an exhaustive definition. On the other hand, it includes certain items apart from the general language used in the main definition. It also excluded certain items mentioned in the definition.

It is not disputed that the case of subsistence allowance of the nature which concerned is not expressly excluded by the definition, nor it is expressly included. The objection of the advocate for the petitioner was that payment of subsistence allowance is not a term of employment because payment of subsistence allowance is discretionary and not obligatory on the part of the employer. It is difficult to accept this contention. The relevant words of the definition, `which would, if the terms of employment express or implied, were fulfilled', in my opinion include the payment of subsistence allowance when the employee is suspended during the inquiry into certain charges against him. The said view has been supported by the Full Bench decision of Punjab High Court in case of Divisional Superintendent, Northern Railways v. Mukund Lal, reported in 1957 (II) LLJ 452.

In yet another important decision of the Bombay High Court in the matter of B.B & C.I Rly. vs. B.C Patil, and Another, reported in 1951 (II) LLJ 584, the Division Bench consisting of the Hon'ble Chief Justice M.C Chagla & Hon'ble Mr. Justice Bhagwati, the very same question whether the suspension allowance is payable during the pendency of the departmental inquiry is covered by the definition of the Wages under Sec. 2 (vi) of the Payment of Wages Act, 1936 and the Authority under the Payment of Wages Act have jurisdiction to entertain such an application claiming the suspension allowance as a part of wages or not. The view taken by Bombay High Court is in favour of the workman, wherein it is held that, `the word `wages' is defined as all remuneration capable of being express in terms of money which would if the terms of contract of employment, express or implied were fulfilled be payable to the person employed and if this payment is in respect to his employment or of the work done, in such employment.' In such cases, when the order of suspension has been passed during the pendency of the departmental inquiry, the contract of employment was not suspended at all with the relationship of master and servant between employer and the employee continue to subsist and the rights and obligations under the contract remain unaffected. Therefore, it is clear on the fact of this case that the respondent workman continue to remain as a servant of the employer and the employer had the power and in fact and indeed exercised powers of issuing direction, order its employee. There is obligation whatsoever upon the employer to insist upon taking the work from his employee, and therefore, the respective obligation of the master and servant continue under the contract. The employee was under an obligation to serve

and if the employee was not under obligation to serve, the employer was not under an obligation to pay wages, and therefore, the real nature of the suspension order and the subsistence allowance is that the employer imposes a find upon the employee and deducts it from his wages instead of paying the employee full wages, the employer pays him only a part of the wages, deducting the balance as a fine. Mere nomenclature does not and should not alter the real substance of the matter. The petitioner may not choose to call the difference between the substance allowance and the wages as a find but in fact and in substance, it is nothing less than a fine imposed by the employer. The suspension suspends for the time being the relationship of mater and servant between the parties. Therefore, if the relationship between master and servant was suspended then suspension must involve payment of subsistence allowance. In the present case is that what the employee was entitled during the period of suspension was wages and not damages and the case also shows that during the period of suspension, the relationship of master and servant continued and that the servant earned the wages and that those wages were withheld by the employer. The definition of wages given in the Act point out that wages can only be earned if the terms of contract of employment; express or implied, were fulfilled. The said expression means that there should be a subsisting contract of employment and that the relationship of master and servant should exist and there should be mutual rights and obligations of the parties to the contract existing, and therefore, the respondent workman was entitled to wages as a subsistence allowance which is considered to be a part of wages during the period of suspension and the Authority under the Payment of Wages Act was competent to order to the petitioner to pay the `subsistence allowance' under the provisions of the Standing Orders Act. The rate which has been specified is 75% of the monthly wages.

Now, with regard to the second contention in respect of delay in making application, Mr. Majmudar has placed reliance upon the provisions of Sec. 15 (ii) of the Act. The said provision reads thus, `every such application shall be presented within twelve months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be.' But, there is yet another provision to the very same sub-section (2) of Section 15 of the Act. The same reads thus, `that any application may be admitted after the said period of twelve months when the applicant satisfies the authority that he had sufficient cause for not making the

application within such period.' Now, considering the second proviso to Sec. 15 (2), the Authority has rightly considered the case of the respondent workman and made him entitled to get subsistence allowance during the pendency of the departmental inquiry, without any limitation as the suspension was continuous even on the date of filing of the application by the respondent workman. The Authority has observed that the suspension of the workman concerned was continuous at the time of filing of the application and he was not paid subsistence allowance from 1985 till the date of filing application, and therefore, the respondent workman is entitled to file application even after the prescribed period of limitation i.e. 12 months as the cause of action is continuous because on each month, the workman concerned is entitled to receive subsistence allowance. Thus, considering the said proviso to Section 15 (2), the Authority has rejected the contention with regard to limitation raised by the petitioner-Company. Now, in rejecting the contention of limitation, the Authority has not committed any error while admitting and entertaining the application filed by the respondent workman. Mr. Majmudar has placed reliance upto one decision of this Court in the matter of S.K Majmudar v. Union of India & Ors., reported in 1983 Lab.I.C 1178 {para-7 in particular}. Now, in that decision, the Court has considered first proviso to sub-section 2 and not considered the second proviso wherein the authority has power to condone the delay, if there being sufficient cause and the Court is satisfied with it. When the second proviso has not been discussed at all, in my opinion, the said decision is not helpful to the petitioner.

In the present matter, the liability of the employer has not been disputed nor even the powers to suspend have been disputed. When these two things are not disputed, in such circumstances, it is the duty of the employer to pay subsistence allowance to the respondent workman regularly but that liability has not been discharged by the petitioner, which is statutory liability under the provisions of the Standing Orders Act, 1946, and therefore, the workman concerned had approached the Authority claiming the subsistence allowance where before the Authority the petitioner Company had raised two technical objections with regard to delay and that such allowance is not covered by the definition of Wages given in Sec. 2 (6) Payment of Wages Act, 1936. Now, in such a situation, it is necessary to consider one aspect which has been elaborately explained in the judgment of the Supreme Court in the matter

between Capt. Palanthony v. Bharat Gold Mines, reproted in (1999) Lab.IC 1565 wherein it is observed that, `on joining Government service, a person does not mortgage or barter away his basic rights as a human being including his fundamental rights in favour of the Government. The Government only because it has the power to appoint does not become the master of the body and soul of the employee. The fundamental rights including the right to life under Art. 21 of the Constitution or the basic human rights are not surrendered by the employee. The provision for payment of subsistence allowance made in the service rules only ensures non-violation of right to life of the employee. The Government by providing job opportunities to its citizens only fulfills its obligations under the Constitution, including the directive principles of the State Policy. The employee on taking up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with the Government or any other employer like instrumentalist of the Government or statutory or autonomous Corporations etc., is being regularized by the terms of the contract of service or service rules made by the Central Government or the State Government under the proviso to Art. 309 of the Constitution or other statutory rules, including certified Standing Orders. Where employee was not provided any subsistence allowance during the period of suspension and the adjournment prayed for by him on account of his illness duly supported by the medical certificates was refused resulting in ex parte proceedings against him, the appellant has been punished in total violation of the principles of natural justice and he was literally not afforded any opportunity of hearing. Moreover, on account of this penury occasioned by non payment of subsistence allowance during pendency of departmental proceedings he could not undertake a journey to attend the disciplinary proceedings from his home town, the findings recorded by the inquiry officer at such proceedings which were held ex parte, stand vitiated. Suspension notwithstanding non payment of subsistence allowance is an inhuman act which has an unpropetitos effect on the life of an employee. When the employee is placed under suspension, he is demobilized and the salary is also paid to him at a reduced rate under the nick name of `subsistence allowance', so that the employee may sustain himself. The very object of paying the reduced salary to the employee during the period of suspension would be frustrated. If even subsistence allowance is not paid because subsistence means of supporting life especially a minimum livelihood. The act of non payment of subsistence allowance can be likened to slow poisoning

as the employee if not permitted to sustain himself on account of non payment of subsistence allowance would gradually starve himself to death.'

In view of the observations made by the Apex Court in the aforesaid decision and considering the reasoning given by the Authority, according to my opinion, the Authority has not committed any error and there is no infirmity in the order. Mr. Majmudar is not able to point out any other infirmity; except the two discussed above.

In view of the fact that there being no error in the Order passed by the Authority, the liability of the employer to pay subsistence allowance during the pendency of the department inquiry is required to be fulfilled by the petitioner, and such technical aspects and contentions which have been raised in this petition cannot be entertained by this Court in exercise of the powers under Art. 226 and 227 of the Constitution of India. Therefore, this petition is required to be dismissed. In view of the fact that I am dismissing the petition, the respondent workman is entitled to draw subsistence allowance from 28th August, 1985 till the date of his dismissal. Mr. Majmudar has conceded that no subsistence allowance has been paid to the workman and in light of the said statement, I am directing the petitioner to pay sum of Rs. 41,850/= to the respondent workman within a period of one month from the date of receipt of certified copy of this order. This petition stands dismissed with no order as to costs.

After the order has been dictated in the open Court, Mr. Majmudar has pointed that the respondent workman must have to satisfy the Authority by giving details as to why delay has occasioned in filing the application and the Authority in turn has to give reasons while accepting the said application after the prescribed period of limitation. While dealing with this contention raised by Mr. Majmudar, it is pertinent to examine the second proviso to Section 15 (ii) of the Act. The said proviso reads as under :-

15. (1) xx
(2) xx
Provided xx xx
Provided further that any application may be admitted after the said period of twelve months when the applicant satisfies the authority that he had sufficient cause for not making the

application within such period.

In the averments made in the said application, the respondent workman has mentioned that he was suspended with effect from 28th August, 1985, pending the departmental inquiry and inspite of the repeated requests made by the respondent workman, the petitioner has not paid any subsistence allowance to the workman and ultimately on 14th August, 1989 written application was also submitted to the petitioner under the provisions of the Employees Standing Orders, 1946. This aspect has been very much considered by the Authority in its Order that during the pendency of the departmental inquiry the workman concerned was not paid subsistence allowance since 1985 and therefore it was a continues cause of action and even on the date of filing of the application, subsistence allowance were not paid to him, and therefore, no limitation clause shall be applicable. The Authority was very much satisfied with the reasons given by the respondent workman and the said fact has been elaborately discussed on page 14, internal page 4 of the order. Therefore, the said contention raised by Mr. Majmudar is turn down because the Authority has satisfied itself with regard to the delay in making the application. Thus, according to my opinion, there is no substance in the said contention raised by Mr. Majmudar, and therefore, this petition is dismissed as having no merits. Ordinarily, the Court issues a writ of certiorari to correct the decisions of the subordinate courts and or the Tribunal; when those decisions are rendered in excess of jurisdiction or in the regular exercise of jurisdiction or when in the exercise of jurisdiction or rules of natural justice are violated. Now, considering the decision of the Authority, it is impossible to say that there is any error which is apparent on the face of the decision rendered by the Authority under the Payment of Wages Act. The Authority has properly complied with the provisions of the Payment of Wages Act and has held that subsistence allowance is covered within the definition of Wages Act and no subsistence allowance has been paid so far by the petitioner from the date of suspension, till the date of filing of the application and there was delay in making payment of subsistence allowance, which is a part of wages. The error of law which may be considered to be apparent on the face of the record is not an error which can be pointed out to the superior Court after a long and elaborate arguments. It is often said that the Court of jurisdiction may decide wrongly in law and yet the superior Court will not interfere with its decision But the error of law contemplated is an error so patent, so manifest that the superior Court will not permit the

subordinate Court to give a decision in the face of a clear ignorance or discreet of a provision of law. If a section of statute is clearly misconstrued or if the provision of law is overlooked or not applied and that appears from the judgment of the lower Court it is then the superior Court which may interfere while exercising powers under Art. 226 and 227 of the Constitution but that certainly is not the case in the present petition. Therefore, in my opinion, this is not a proper case where interference of this Court is required while exercising the power under Art. 226 and 227 of the Constitution of India. Therefore, according to my opinion, the Authority has acted within its jurisdiction and not exceed its jurisdiction and gave a detailed reasoned order, after application of mind and there is no infirmity in the order which has been pointed out by Mr. Majmudar, and therefore, according to my opinion, there is no substance in the petition.

Notice is discharged with no order as to costs.

[H.K Rathod, J.]

Prakash*